U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF C-T-S-C-S-S-

DATE: NOV. 7, 2016

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a K-12 educational institution, seeks to classify the Beneficiary as an advanced placement (AP) science teacher of exceptional ability. *See* section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). This second preference classification makes immigrant visas available to foreign nationals with a degree of expertise significantly above that normally encountered in the sciences, arts, or business. The Petitioner also seeks Schedule A, Group II designation.[1]

The Director of the Texas Service Center denied the petition, concluding that the Petitioner had not established that the position required an individual of exceptional ability. The AAO dismissed a subsequent appeal.

The matter is now before us on a joint motion to reopen and reconsider. In its motion, the Petitioner submits additional material and maintains that we erred by relying on documentation outside the record without affording an opportunity to respond, and by applying a standard above preponderance of the evidence.

Upon review, we will deny the motions.

I. LAW

Section 203(b)(2) of the Act provides classification to qualified individuals who are members of the professions holding advanced degrees or their equivalent, or who, because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States. The implementing regulation at 8 C.F.R. § 204.5(k)(2) states: "Exceptional ability in the sciences, arts, or business means a degree of expertise significantly above that ordinarily encountered in the

[1] Schedule A occupations are those that the Department of Labor (DOL) has determined are ones with insufficient United States workers who are able, willing, qualified, and available. 20 C.F.R. §§ 656.5, 656.15. Employers apply for Schedule A labor certification with U.S. Citizenship and Immigration Services. *Id.*

sciences, arts, or business." Unless seeking a waiver in the national interest, the petition must be accompanied by a valid, individual labor certification or an application for Schedule A designation that demonstrates the job requires an individual of exceptional ability. 8 C.F.R. § 204.5(k)(4)(i). In the instant case, the Petitioner seeks Schedule A, Group II designation.

In explaining the evidentiary requirements, the regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth six criteria related to exceptional ability. Specifically, a petitioner must provide documentation that satisfies at least three of these criteria in order to meet the initial requirements for this classification. The submission of sufficient initial evidence does not, however, in and of itself establish eligibility. If a petitioner satisfies these initial requirements, we then consider the entire record to determine whether the individual has a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (holding that the "truth is to be determined not by the quantity of evidence alone but by its quality").[2]

To qualify under Schedule A, Group II, a petitioner must submit evidence of the beneficiary's exceptional ability in the sciences or arts as demonstrated by widespread acclaim and international recognition from recognized experts in the field. 20 C.F.R. § 656.15(d)(1). Among other evidentiary requirements, the petitioner must show that the beneficiary's work in that field during the past year required exceptional ability and that the position for which it seeks the beneficiary's services also requires exceptional ability. *Id.*

A motion to reopen must state the new facts to be provided and be supported by affidavits or other documentation.[3] A motion to reconsider must offer the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Service (USCIS) policy.[4] A motion to reconsider is based on the existing record and a petitioner may not introduce new facts or new evidence relative to his or her arguments. A motion to reconsider contests the correctness of the original decision based on the previous factual record, as opposed to a motion to reopen which seeks a new hearing based on new materials.[5]

II. ANALYSIS

The Petitioner filed the Form I-140, Immigrant Petition for Alien Worker, in behalf of the Beneficiary, seeking (1) to classify him as an individual of exceptional ability and (2) Schedule A, Group II designation. The Director found that the Beneficiary meets the exceptional ability requirements under 8 C.F.R. § 204.5(k)(3)(ii) and 20 C.F.R. § 656.17(d)(1). We agreed. The sole

[2] *Cf. Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the evidence is first counted and then, if it satisfies the required number of criteria, considered in the context of a final merits determination).
[3] 8 C.F.R. § 103.5(a)(2).
[4] 8 C.F.R. § 103.5(a)(3).
[5] *Compare* 8 C.F.R. § 103.5(a)(3) *and* 8 C.F.R. § 103.5(a)(2).

issue, therefore, is whether the job offer portion of the Schedule A application demonstrates that the job requires an individual of exceptional ability.[6] On motion, the Petitioner requests an opportunity to supplement the record, maintains that the AAO applied too high a burden of proof, and provides new exhibits. For the reasons discussed below, the concerns the Petitioner raise do not warrant reopening the matter for the purpose of issuing a request for new evidence as requested by the Petitioner. Additionally, the new material does not establish eligibility.[7]

A. Opportunity to Respond to New Factual Issues

The Petitioner requests that we reopen the matter to allow the Petitioner additional time to present new evidence because the AAO raised new factual issues and framed the question in a novel way without first allowing the Petitioner to respond to this information. The Petitioner identifies the new facts as a 2010 article and a job notice posting on the Petitioner's website. The Petitioner, however, provided the article on appeal; we did not go outside the record to review that item.[8] While we did reference a job notice posting outside the record, we did so in a footnote and it was not a determinative part of our analysis.

Finally, the Petitioner has repeatedly maintained that the nature of instructing a dual-credit course, one that is taught in a high school pursuant to a partnership with a university for both high school and college credit, requires a teacher of exceptional ability. For example, on page 16 of the Petitioner's response to the Director's notice of intent to deny the petition, it advised that the partnering university evaluates the teacher for competence teaching college-level courses and, two paragraphs later, contended that such teachers are "the functional equivalent of a university professor without the benefit of university resources and infrastructure, a job that definitely requires exceptional ability." Similarly, on page 6 of the appellate brief, the Petitioner affirmed that the job "requires exceptional ability to teach high school students for college credit." Based on these explanations, we stated that the "relevant question is whether the requirements for teaching a dual credit class are sufficiently rigorous that they necessitate an instructor of exceptional ability."

On motion, the Petitioner requests an opportunity to respond to this question as the manner in which we framed it was new. It advises that it will show dual credit classes in science, technology, engineering and math (STEM) fields are distinguishable from English and public speaking dual credit courses. We framed the question based on the positions the Petitioner advanced throughout the proceeding. While we would consider any clarification of the nature of STEM teaching positions filed concurrently with the motion, the Petitioner has not demonstrated that we need to reopen the matter to afford the Petitioner additional time to supplement the record.

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[6] 8 C.F.R. § 204.5(k)(4); 20 C.F.R. § 656.15(d)(1) (a petitioner must show the intended work in the United States will require exceptional ability as defined by DOL).

[7] While the Petitioner alleges that neither we nor the Director issued a "standard" request for evidence (RFE), the regulation at 8 C.F.R. § 103.2(8) indicates that the decision to issue an RFE is at USCIS' discretion. The Petitioner has presented no evidence that we abused our discretion.

[8] The article was the first item in exhibit 43 and is entitled ' by printed from the website

While 8 C.F.R. § 103.3(a)(2)(vii) allows an appellant to supplement an appeal, the regulation relating to motions at 8 C.F.R. § 103.5 do not contain a similar provision. For the reasons discussed above, the Petitioner has not presented a persuasive basis for us to reopen the matter for the purpose of issuing a request for evidence. Nevertheless, we will consider those items the Petitioner has included with the motion filing.

B. Standard of Proof

The Petitioner cites the Administrative Appeals Office Practice Manual 14 (May 2016), www.uscis.gov/aao, for the proposition that the correct standard is preponderance of the evidence. We acknowledge that is the correct standard. *Chawathe*, 25 I&N Dec. at 376. Our previous decision considered all of the Petitioner's contentions and all of the exhibits in the record, concluding that it had not established by a preponderance of the evidence that the job requires an individual of exceptional ability. Accordingly, the Petitioner has not shown that the decision was based on an incorrect application of law or USCIS policy as required for a motion to reconsider.

C. New Evidence on Motion

The broad issue is whether the job offer portion of the Schedule A application demonstrates that the job requires an individual of exceptional ability. 8 C.F.R. § 204.5(k)(4). The Petitioner noted that the Form 9089, Application for Permanent Employment Certification, did not exist at the time the regulation was promulgated. While true, the new form still contains a section dedicated to the tendered position. The Petitioner also maintains that the "Schedule A application" incorporates all the supporting documents, not just the Form 9089. The regulation at 20 C.F.R. § 656.15(b), (d) does indicate that a Schedule A application includes supporting evidence. The regulation at 8 C.F.R. § 204.5(k)(4) makes clear, however, that it is the job offer portion we evaluate, which appears on the Form 9089. Moreover, we have not limited ourselves to part H of the application; rather, we have also looked at the wage specified in part G. The Petitioner specified on the Form 9089 that the jobrequires: "Exceptional ability [] to teach high school students for college level credit." While we acknowledged that language, we found it conclusory and a repetition of the language of the classification without details of how the job requirements compared with the exceptional ability criteria at 8 C.F.R. § 204.5(k)(3)(A)-(F).

On motion, the Petitioner maintains that the STEM nature of the coursework, combined with the dual credit level, demonstrates why the position requires exceptional ability. The record contains a September 2015 letter from the Petitioner's headmaster, [redacted] describing its STEM initiative. The letter acknowledges that the position does not require an advanced degree, but affirms generally that the position does require exceptional ability. [redacted] does not, however, detail the job requirements that are indicative of such ability, which might include a degree,

membership, or license not ordinarily encountered among teachers; ten or more years of experience; or recognized achievements and significant contributions.[9]

Part H of the Form 9089 reflects that the job requires a bachelor's degree in physics, no experience, and eligibility for the Texas State Board for Educator Certification. Even if we accepted that eligibility for certification sufficiently confirms that the job ultimately requires licensure, it remains that "possession of a degree . . . or a license to practice or certification for a particular profession or occupation shall not by itself be considered sufficient evidence of such exceptional ability." Section 203(b)(2)(C) of the Act.

On motion, the Petitioner submits its hiring salary scale and that of the promotional material about the petitioning school, and prevailing wage information for and The Petitioner's hiring scale reflects that the highest salary it offers is $44,366, available to teachers with a Ph.D. and 25 years of experience. The pays $59,155 to those with similar credentials. The source of these scales, however, is not apparent from the document. The mean wage for postsecondary teachers in is $63,540, while the same wage for this occupation in is $54,640. None of this data shows that the proffered wage of $45,500 is indicative of a position that requires a teacher of exceptional ability.

III. CONCLUSION

The motions will be denied for the above stated reasons. It is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of C-T-S-C-S-S-*, ID# 47615 (AAO Nov. 7, 2016)

[9] *See* 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F).